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### Criminal Law--Pardon--Second Offender--Effect of Pardon by Executive (People ex rel. Prisament v. Brophy, 287 N.Y. 132 (1941))

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Code of Criminal Procedure,<sup>1</sup> a conviction could be had upon the uncorroborated testimony of an accomplice alone. But the courts would instruct the jury to weigh strictly the uncorroborated testimony of the accomplice.<sup>2</sup> The subsequent enactment of the Statute<sup>3</sup> did not establish any exclusive test for the admissibility of evidence which tends to corroborate the evidence of the accomplice. Therefore, there may be no conviction unless the accomplice's testimony is corroborated by independent evidence which connects the defendant with the crime charged.<sup>4</sup> The court in a four-to-three decision held that the evidence in this case was insufficient to convict the defendant. There was nothing, said the majority, that identified the defendant as a participant in the crime. The evidence of the non-accomplice witnesses was also inadmissible to support the credibility of Reles since "it was on merely slight, remote or conjectural significance" and tended to surprise and prejudice the defendant.<sup>5</sup> The dissent by Judge Lewis contended that the non-accomplice testimony did not prejudice the rights of the defendant since it served to "confirm and give credence to the narrative."

J. A. S.

CRIMINAL LAW — PARDON — SECOND OFFENDER — EFFECT OF PARDON BY EXECUTIVE.—Relator was convicted of attempted robbery in the third degree upon his plea of guilty. The District Attorney of the county filed an information<sup>1</sup> accusing relator of having been convicted previously in a federal court of robbing a member bank of the Federal Deposit Insurance Corporation. Relator acknowledges his former conviction and was sentenced as a second offender.<sup>2</sup> Although the records establish his conviction in the federal court, it also appears from official records that two years after his conviction

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<sup>1</sup> CODE CRIM. PROC. § 399 L. 1881, c. 442, as amd. L. 1882, c. 3.

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

<sup>2</sup> *People v. Dixon*, 231 N. Y. 111, 131 N. E. 752 (1921); *Lindsay v. People*, 63 N. Y. 143 (1875).

<sup>3</sup> See note 1, *supra*.

<sup>4</sup> *People v. Kress*, 284 N. Y. 452, 31 N. E. (2d) 898 (1940); *People v. Maione*, 284 N. Y. 423, 31 N. E. (2d) 759 (1940); *People v. Feolo*, 284 N. Y. 381, 31 N. E. (2d) 496 (1940).

A charge to the jury that if they believe "the testimony of the witness Reles [accomplice] they cannot convict on his testimony unless it is corroborated by other independent, believable evidence tending to connect the defendant with the commission of the crime," was held to be a proper charge. *People v. Goldstein*, 285 N. Y. 376, 34 N. E. (2d) 362 (1941).

<sup>5</sup> *People v. Harris*, 209 N. Y. 70, 102 N. E. 546 (1913).

<sup>1</sup> N. Y. PENAL LAW § 1943.

<sup>2</sup> N. Y. PENAL LAW § 1941.

he received a "full and unconditional pardon" from the President of the United States. The pardon contains a preamble, "Whereas it has been made to appear to me that the said Martin Prisament is innocent of the offense for which he is now being held." Relator, by writ of *habeas corpus*, has challenged the power of the court to impose upon him a sentence as a second offender, since it appears that, after conviction of the first offense, he has received a complete and unconditional pardon upon a finding by the President that he is innocent of that offense.. From an order of Special Term of County Court dismissing the writ of *habeas corpus*, relator appeals. *Held*, affirmed. The relator was legally sentenced as a second offender. *People ex rel. Prisament v. Brophy*, 287 N. Y. 132, — N. E. —, 38 N. E. (2d) 468 (1941).

A pardon, as the term imports, is an act of grace<sup>3</sup> and mercy<sup>4</sup> proceeding from the Chief Executive of the State<sup>5</sup> or Federal Government<sup>6</sup> which exempts the individual upon whom it is bestowed from the punishment the law inflicts for a crime he has committed.<sup>7</sup> It generally supposes the object guilty.<sup>8</sup> If there is no guilt there is no ground for forgiveness.<sup>9</sup> A party is acquitted on the ground of innocence; he is pardoned through favor.<sup>10</sup> A pardon relieves the offender of all unenforced penalties annexed to the conviction,<sup>11</sup> and usually removes any disqualifications or disabilities which generally would have followed from the conviction.<sup>12</sup> However, the effect of a pardon is prospective and not retrospective.<sup>13</sup> It does not change the past nor obliterate the fact that the crime was committed, nor that the person had been convicted of it,<sup>14</sup> because, although the legal effect of a past act can be removed, the act itself can not.<sup>15</sup> The one intrusted with the execution of the laws has the power to exempt an individual from the punishment the law inflicts for a crime he has

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<sup>3</sup> *Moore v. State*, 43 N. J. Law (14 Vroom) 203 (1881); *Roberts v. State*, 30 App. Div. 106, 51 N. Y. Supp. 691 (3d Dep't 1898); *State v. Peters*, 43 Ohio St. 629, 4 N. E. 81 (1885).

<sup>4</sup> *United States v. Morris*, 10 Wheat. 246 (U. S. 1825).

<sup>5</sup> *Ex parte Campion*, 79 Neb. 364, 112 N. W. 585 (1907).

<sup>6</sup> *United States v. Wilson*, 7 Pet. 150 (U. S. 1833).

<sup>7</sup> *Roberts v. State*, 160 N. Y. 217, 54 N. E. 678 (1899).

<sup>8</sup> *United States v. Morris*, 10 Wheat. 246 (U. S. 1825).

<sup>9</sup> *Roberts v. State*, 160 N. Y. 217, 54 N. E. 78 (1899).

<sup>10</sup> Williston, *Does a Pardon Blot Out Guilt?* (1915) 28 HARV. L. REV. 647.

<sup>11</sup> *Roberts v. State*, 160 N. Y. 217, 54 N. E. 678 (1899).

<sup>12</sup> *Beck v. Finegan*, 254 App. Div. 110, 3 N. Y. S. (2d) 1009 (1st Dep't 1938), *aff'g*, 164 Misc. 334, 298 N. Y. Supp. 675 (1937).

<sup>13</sup> *In re Spenser*, 22 Fed. Cas. 921 (1878); *Roberts v. State*, 160 N. Y. 217, 54 N. E. 678 (1899).

<sup>14</sup> *People ex rel. Geiselman v. Hunt*, 275 N. Y. 612, 11 N. E. (2d) 781 (1937); *People v. Carlesi*, 154 App. Div. 481, 139 N. Y. Supp. 309 (1st Dep't 1913).

<sup>15</sup> *People v. McIntyre*, 99 Misc. 17, 163 N. Y. Supp. 528 (1917); *People v. Price*, 53 Hun 185, 6 N. Y. Supp. 833 (1889), *aff'd*, 119 N. Y. 650, 23 N. E. 1149 (1890).

committed.<sup>16</sup> This power is conferred upon him by the Constitution and cannot be limited by statute or decision.<sup>17</sup> It does not have the retroactive effect of determining whether the judgment was erroneous.<sup>18</sup> The highest court of the state, in deciding that the legislative branch could not encroach upon the pardoning power of the Executive, in the person of either the President or Governor, did not intend to hold that the Executive could blot out a solemn record of the judicial branch of the Government.<sup>19</sup> Consequently, in the instant case, a pardon which is granted by the President because he is satisfied that the convicted person is innocent, has no retroactive effect on the judgment of conviction which has not been set aside nor reversed by the judicial department. The pardon merely takes away the penalty directly attaching to the offense. It does not destroy the fact that the crime was committed nor that the person had been convicted of it.<sup>20</sup> Perhaps the legislature should declare by statute that a pardon should state the reason for which it is granted, and that it should have the effect of relieving the convicted person from further punishment and from all other legal consequences of the crime. But it should not absolve a party from guilt unless the pardon was granted on the ground of innocence.<sup>21</sup>

S. L.

MUNICIPAL CORPORATIONS—TORTS—LIABILITY OF CITY FOR ASSAULT BY EMPLOYEE IN CHARGE OF REPAIRING STREET.—Plaintiff drove down a street in Brooklyn in a freshly painted truck. The street was being repaired by the city and there remained for vehicular traffic a narrow portion, above which were overhanging branches, likely to scratch plaintiff's truck. There were no warning notices or barriers, at the intersections to the street, indicating that there were any obstructions to be encountered. The defendant, Sisto, in charge of the group doing the repair work, ordered plaintiff to proceed under the branches. When plaintiff refused, Sisto attempted to enter the

<sup>16</sup> *Ex parte* Campion, 79 Neb. 364, 112 N. W. 585 (1907); *People v. Larkman*, 137 Misc. 446, 244 N. Y. Supp. 431 (1930).

<sup>17</sup> *Ex parte* Garland, 71 U. S. (4 Wall.) 333 (1866); *People ex rel. Page v. Brophy*, 248 App. Div. 309, 289 N. Y. Supp. 362 (4th Dep't 1936), *app. dismissed*, 277 N. Y. 673, 14 N. E. 384 (1938).

<sup>18</sup> *Roberts v. State*, 30 App. Div. 106, 51 N. Y. Supp. 691 (3d Dep't 1898).

<sup>19</sup> *In re* Spenser, 22 Fed. Cas. 921 (1878); *Roberts v. State*, 160 N. Y. 217, 54 N. E. 678 (1899); *Baldi v. Gilchrist*, 204 App. Div. 425, 198 N. Y. Supp. 493 (1st Dep't 1923); *People v. McIntyre*, 99 Misc. 17, 19, 163 N. Y. Supp. 528 (1917); *People v. Carlesi*, 154 App. Div. 481, 139 N. Y. Supp. 309 (1st Dep't 1913).

<sup>20</sup> *People ex rel. Prisament v. Brophy*, 287 N. Y. 132, 38 N. E. (2d) 468 (1941); *People v. McIntyre*, 99 Misc. 17, 163 N. Y. Supp. 528 (1917).

<sup>21</sup> *Weihofen, The Effect of a Pardon* (1939) 88 PENN. L. REV. 177.